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No. 99-1238

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

CHRISTOPHER ARTUZ, Superintendent,
Greenhaven Correctional Facility,

*Petitioner,*

—v.—

TONY BRUCE BENNETT,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR THE PETITIONER

RICHARD A. BROWN
District Attorney, Queens County

GARY S. FIDEL
JOHN M. CASTELLANO*
Assistant District Attorneys

District Attorney's Office
Queens County
125-01 Queens Boulevard
Kew Gardens, New York 11415
(718) 286-5801

* *Counsel of Record*
*for the Petitioner*

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## QUESTION PRESENTED

Is a state post-conviction application "properly filed" within the meaning of 28 U.S.C. section 2244(d)(2), which tolls the one-year statute of limitations for habeas corpus petitions, if it is procedurally barred from review under state law?

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 199 F.3d 116, and reprinted in the Appendix to the Petition for a Writ of Certiorari at 4a. The unpublished opinion and order of the United States District Court for the Eastern District of New York is also reprinted in that Appendix at 1a. The certificate of the New York Court of Appeals denying leave to appeal is reported at 69 N.Y.2d 1001, 517 N.Y.S.2d 1034 (1987). The decision of the New York State Appellate Division of the Supreme Court affirming the judgment of conviction is reported at 128 A.D.2d 540, 512 N.Y.S.2d 472 (2d Dept. 1987).

## JURISDICTION

The judgment of the Court of Appeals was entered on October 25, 1999. The petition for a writ of certiorari was filed within 90 days of that date, on January 24, 2000, and is therefore timely. Sup. Ct. R. 13. The jurisdiction of this Court rests on 28 U.S.C. section 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 2244(d)(2) of Title 28 of the United States Code provides:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Section 440.10(2) of the New York Criminal Procedure Law is reprinted in the Petition for a Writ of Certiorari at 3-4.

## STATEMENT OF THE CASE

On March 28, 1984, respondent Tony Bruce Bennett was found guilty in New York State Supreme Court of two counts of Attempted Murder in the First Degree and other crimes for firing a handgun at pursuing police officers during a high-speed chase. During the next fourteen years, he made a series of unsuccessful attempts to overturn his conviction, culminating in the habeas corpus petition in this case.

First, prior to sentence, Bennett moved to set aside the verdict, pursuant to New York Criminal Procedure Law section 330.30, on the basis of newly discovered evidence and on the ground that the trial court had committed reversible error in precluding a defense witness. That motion was denied in a lengthy written decision on December 1, 1984 (JA 79-93).[1]

Second, Bennett filed a direct appeal alleging six claims of error, including the claim that the trial court had committed reversible error in precluding a defense witness (JA 11-41). Bennett's conviction was unanimously affirmed by the New York State Appellate Division, Second Department, on March 2, 1987. *People v. Bennett*, 128 A.D.2d 540, 512 N.Y.S.2d 472 (2d Dept. 1987). With regard to defendant's witness preclusion claim, the court held that the trial court had erred under state

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[1]After the motion to set aside the verdict was denied, Bennett was sentenced to fifteen years to life on the attempted murder counts and to lesser concurrent sentences on the remaining counts. Bennett was later tried and convicted under Indictment Number 757/85 of Robbery in the First Degree, Assault in the First Degree, and lesser charges. He was sentenced to a term of twelve and one-half to twenty-five years on the first-degree robbery count and lesser concurrent sentences on the remaining counts, all of which were to be served consecutively to his sentence in this case. *People v. Bennett*, 144 A.D.2d 564, 534 N.Y.S.2d 422 (2d Dept. 1988), *leave to appeal denied*, 73 N.Y.2d 889, 538 N.Y.S.2d 801 (1989). He is currently incarcerated pursuant to these sentences.

law, but that the error was harmless beyond a reasonable doubt. It found Bennett's remaining contentions to be without merit. Leave to appeal to the New York Court of Appeals, the State's highest court, was denied on May 7, 1987. *People v. Bennett*, 69 N.Y.2d 1001, 517 N.Y.S.2d 1034 (1987). Bennett did not file a petition for a writ of certiorari in this Court.

Third, on May 28, 1991, four years after the New York Court of Appeals denied leave to appeal, Bennett filed a collateral motion to vacate his conviction pursuant to New York Criminal Procedure Law section 440.10 (JA 104). Bennett argued that newly discovered evidence warranted a new trial, that the prosecutor had made improper comments in summation during his trial seven years earlier, and that all of his prior attorneys were ineffective (JA 104).

The trial judge denied the motion on August 2, 1991 (JA 97). The court held, *inter alia*, that the summation error claim was procedurally barred under New York law, which precludes review of a claim that could have been raised on direct appeal but was not (JA 107). *See* N. Y. Crim. Proc. Law §440.10(2)(c). The Appellate Division denied leave to appeal on September 30, 1991.

Fourth, in 1995, Bennett filed another collateral motion to vacate his conviction under section 440.10 (JA 112-21). This application contained three claims: first, that the trial court had committed reversible error in precluding the defense witness, a claim Bennett had made on direct appeal (JA 114-19); second, that the prosecutor had committed misconduct by urging the court to preclude the defense witness (JA 119); and third, that he had been denied his right to be present at a pre-trial proceeding held pursuant to *People v. Sandoval*, 34 N.Y.2d 371, 357 N.Y.S.2d 849 (1974), to determine which prior crimes the prosecutor could use to impeach him (JA 119-21).

The prosecution responded, *inter alia*, that all three of Bennett's claims were subject to a mandatory procedural bar. As the prosecutor explained, under the procedural bars contained in section 440.10(2), a court cannot hear the merits of a claim that was previously raised on appeal and decided adversely to the defendant or a claim that could have been raised on direct appeal but was not. Because Bennett's claims were either raised on direct appeal or could have been, the court could not consider the merits (JA 126-31).

In an oral decision on the record on November 30, 1995, the trial court denied the motion without elaboration (JA 142-43). Bennett later wrote letters to the court seeking a copy of the written decision, without which Bennett could not seek leave to appeal. Bennett never received that written decision.

On February 11, 1998, nearly fourteen years after he was found guilty in state court and almost eleven years after the conclusion of direct review, Bennett filed a federal habeas corpus petition in the Eastern District of New York. *See* Petition, No. 98-CV-1274 (E.D.N.Y.). In it, Bennett raised three grounds for issuance of the writ. In Ground One of the petition, he again raised the witness preclusion claim, a claim that he had first raised in state court almost fourteen years earlier in his motion to set aside the verdict. In Ground Two, Bennett argued that he was denied his right to be present at the *Sandoval* proceeding. In Ground Three, Bennett argued that counsel was ineffective for failing to object to the prosecutor's allegedly improper summation comments. Bennett then argued that trial counsel was ineffective "under the facts presented" in all three grounds.

The District Court summarily dismissed the petition as time-barred under the one-year statute of limitations in the Anti-Terrorism and Effective Death Penalty Act of 1996. *Tony Bennett v. Christopher Artuz*, No. 98-CV-1274 (E.D.N.Y.

February 25, 1998)(Cert. Pet. App. at 1a). The court held that, under the Second Circuit's decision in *Peterson v. Demskie*, 107 F.3d 92 (2d Cir. 1997), Bennett, whose conviction had become final before the enactment of AEDPA, had a grace period consisting of a "reasonable time" after the effective date of AEDPA to file his petition. He had exceeded that reasonable time by failing to file the petition until one year and nine and one-half months after the Act's effective date. The court noted that the petition did not set forth any reason for the delay.

The Second Circuit granted a certificate of appealability. In that court, Bennett argued that AEDPA's statute of limitations had never begun to run in his case (Brief of Appellant at 6-11). He noted that under 28 U.S.C. section 2244(d)(1)(B), the limitations period commences on the latest of four dates, one of which is the date on which an impediment to filing is removed. He argued that the state courts had prevented him from filing his petition by refusing to give him a written copy of the decision on his 1995 motion, which was required in order to seek leave to appeal from the order denying the motion.

The Second Circuit decided the case on a different ground. *Bennett v. Artuz*, 199 F.3d 116 (2d Cir. 1999). The Second Circuit held that the tolling provision of section 2244(d)(2) for "properly filed" state court post-judgment proceedings applied to Bennett's case and tolled all of the time from the enactment of AEDPA to the filing of the petition. In so doing, the court made three rulings, all of which were necessary to an outcome favorable to Bennett. The court first decided that the tolling provision applied to the one-year grace period that it had given to state prisoners to file their petitions under *Ross v. Artuz*, 150 F.3d 97, 99 (2d Cir. 1998), which was decided after the district court decision. *Id.* at 118-19. The court then concluded that the 1995 motion was still "pending" through the time Bennett had filed the habeas petition because the state had never provided Bennett with a copy of the written

decision allowing him to appeal and thus state court review of the motion had not been completed. *Id.* at 119-21.

Finally, the court held that Bennett's 1995 motion was "properly filed" within the meaning of the tolling provision. The court noted the split of authority over the meaning of the term and noted that neither AEDPA nor its legislative history explained which state filings qualify as "properly filed" applications. *Id.* at 121. The Second Circuit then held that the tolling provision encompasses any "application for state post-conviction relief recognized as such under governing state procedures." *Id.* at 123. The court applied this language to Bennett's 1995 motion, tolling the statute of limitations for the motion, even though the motion was mandatorily procedurally barred under state law.

This Court then granted certiorari on the question of whether the Second Circuit erred in applying the tolling provision to a state court application that was procedurally barred and could not be heard on the merits. ***Artuz v. Bennett***, __ U.S. __, 120 S. Ct. 1669 (2000).

## SUMMARY OF ARGUMENT

In enacting the Anti-Terrorism and Effective Death Penalty Act of 1996, Congress effected sweeping changes in the handling of federal habeas corpus petitions in order to curb the abuse of the writ and address the acute problems of unnecessary delay. A key provision of that legislation was the new one-year statute of limitations imposed on state prisoners who, Congress found, routinely seek redress in federal court far too long after their convictions become final in state court. 28 U.S.C. §2244(d).

While seeking to limit delays, Congress provided a tolling provision in the statute, designed to allow state prisoners

to exhaust state remedies before coming to federal court. In interpreting that tolling provision, which suspends the statute of limitations during the pendency of "properly filed" state post-conviction applications, however, the Second Circuit permitted tolling for every "post-conviction application recognized as such" by state courts, including those subject to mandatory state procedural bars. *Bennett*, 199 F.3d at 123. The Second Circuit thereby interpreted the statute to tolerate entirely needless delays that undermine the purpose and operation of the limitations period while doing nothing to advance the objective of the tolling provision.

The Second Circuit interprets the tolling provision to include entirely repetitive post-conviction applications that are barred under state rules, regardless of whether the application is the prisoner's first or fiftieth. The delays caused by these motions can accumulate rapidly from months to years, during which time no useful end is achieved. Moreover, this interpretation affords state prisoners, against whom the limitations period was designed to run, the power to extend the period of limitations at will simply by filing repetitive, procedurally barred motions in state court. This result is especially troublesome as applied to capital prisoners, whose delays were of particular concern to Congress, because those petitioners have an exceptionally compelling incentive to delay.

The Second Circuit's formulation also extends the provision far beyond its purpose, because state post-conviction applications that are mandatorily barred under state law cannot advance the purposes of exhaustion. *See, e.g., Gray v. Netherland*, 518 U.S. 152, 161 (1996); *Teague v. Lane*, 489 U.S. 288, 297-98 (1989) (plurality opinion). Still worse, the interpretation fails to show adequate respect for state court procedural rules, as required by principles of federalism central to this Court's habeas corpus jurisprudence. *See Coleman v. Thompson*, 501 U.S. 722, 726 (1991). It instead ignores the

vast majority of those rules and affords a benefit, in the form of tolling, to prisoners who do the same.

By contrast, an interpretation that denies tolling for state court applications that are mandatorily procedurally barred prevents prisoners from benefitting from repetitive litigation, precludes prisoners in capital cases from causing the same delays that they could have before the statute, and excludes from the tolling provision only state applications that could not have served the purposes of exhaustion. It also accords state procedural rules their due respect, as federalism requires.

The objections to an interpretation that denies tolling for procedurally barred state applications are essentially that it over-involves the federal courts in state procedural issues that state courts are better equipped to handle, that it "engrafts" a "merits requirement" onto the statute, that it is overly harsh on petitioners who may not understand state procedures, and that the delays that would be tolerated under a contrary interpretation are insignificant and readily controlled by other means. These claims are unavailing.

First, the federal courts already decide whether a claim is procedurally barred under state law when determining whether a remedy is "available" under the exhaustion doctrine, and the courts' prior decisions on these issues can provide guidance in applying the tolling provision. Second, the "merits inquiry" required is simply an application of the states' procedural rules, and involves no more of an examination of the true merits than would be currently performed in interpreting those rules under the exhaustion doctrine. Nor does an interpretation of the vague term "properly" that gives effect to state procedural rules "engraft" anything onto the statute that Congress did not intend. Third, petitioners are already required to be familiar with state procedural rules under current habeas practice. Moreover, the problem of a prisoner who believes that

he has reasonably invoked an exception to the procedural rule can be addressed by resolving such true ambiguities in favor of the prisoner and allowing tolling, just as a court considering whether a claim is procedurally barred under state law for exhaustion purposes would resolve such ambiguities in favor of exhaustion. *See Castille v. Peoples*, 489 U.S. 346, 349 (1989) (presumption in favor of exhaustion).

Fourth, the delays caused by repetitious state prisoner litigation are truly significant, and capital prisoners are particularly likely to take advantage of every possible opportunity to delay that is afforded to them. Moreover, the proposed alternatives that, it is argued, could be enacted by the states to limit delay contravene fundamental principles of federalism that require the federal courts to avoid imposing a single solution "from the top down" on a difficult question of policy, such as how to control repetitive prisoner litigation. *See Smith v. Robbins*, __ U.S. __, 120 S. Ct. 746, 758 (2000).

Applying, then, the correct interpretation of the statute, Bennett's last state-court motion did not toll the limitations period because it was mandatorily barred under state law. The Second Circuit thus erred in excluding the period of time during which that motion was pending from the limitations period, and the judgment below should be reversed.

## ARGUMENT

**THE SECOND CIRCUIT ERRED IN HOLDING THAT BENNETT'S STATE POST-JUDGMENT APPLICATION, WHICH WAS PROCEDURALLY BARRED UNDER NEW YORK LAW, WAS "PROPERLY FILED" AND THEREFORE SUFFICIENT TO TOLL AEDPA'S ONE-YEAR STATUTE OF LIMITATIONS.**

In holding that AEDPA's one-year statute of limitations is tolled for every "application for post-conviction relief recognized as such," the Second Circuit allowed tolling for motions, like respondent Bennett's, that are subject to a mandatory procedural bar under state law and cannot be heard on the merits. This interpretation allows state prisoners to benefit from repetitious, needless applications in a manner that serves neither the objective of curbing delays nor the aims of the exhaustion doctrine. The interpretation also provides a tool for dilatory prisoners, particularly prisoners in capital cases, to extend the statute, and it shows disrespect for, and affirmatively undermines, state procedural rules that attempt to control state post-conviction litigation. Congress could not have intended such results.

All of the defects in the Second Circuit's interpretation stem from the court's failure to understand and appreciate the need Congress perceived to halt state prisoners' unnecessary delays in coming to federal court, the function of the tolling provision in the statutory scheme, and the need to balance the aims of each.

Congress enacted its one-year statute of limitations for state prisoners seeking habeas relief to address "acute problems of unnecessary delay" in habeas review. *See* H.R. Conf. Rep. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 944. As Congress recognized, and this Court has observed in

the past, the detrimental effects of delays take many forms. Delays in a definitive adjudication of guilt undermine the finality of state court judgments of conviction by keeping them perpetually subject to attack in federal court and therefore forever tentative in their conclusions. *See McCleskey v. Zant*, 499 U.S. 467, 491 (1991) ("Neither innocence nor just punishment can be vindicated until the final judgment is known"); *Mackey v. United States*, 401 U.S. 667, 690 (1971) (all parties have an interest in "insuring that there will at some point be the certainty that comes with an end to litigation . . . .") (Harlan, J., concurring). Delays also impair the state's legitimate interest in deterring crime, inasmuch as the deterrent force of penal laws is weakened by the realization that any punishment that is imposed may be overturned at any time. *See Engle v. Isaac*, 456 U.S. 107, 127-28 n. 32 (1982). So too the state's interest in rehabilitating a suspect is undermined because "rehabilitation demands that the convicted defendant realize that 'he is justly subject to sanction, that he stands in need of rehabilitation.'" *Id.* at 128 (quoting Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 452 [1963]); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 262 (1973) (Powell, J., concurring). And, as this Court has observed, "Perpetual disrespect for the finality of convictions disparages the entire criminal justice system." *McCleskey*, 499 U.S. at 492; *see also Spalding v. Aiken*, 460 U.S. 1093, 1096-97 (1983) (Burger, C.J., concurring); 141 Cong. Rec. S7807 (1995) (Sen. Hatch).

Lengthy delays also impair the ability of the state to conduct retrials due to the "erosion of memory" and "dispersion of witnesses" that occur with the passage of time, and delays thereby diminish the chances of a reliable adjudication of guilt. *See McCleskey*, 499 U.S. at 491; *Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986) (plurality opinion). Morever, delays extend the ordeal of the victims and victims' families who, must endure the possibility that the offender will go free, no matter how much

time has passed since the trial or appeal in state court. 141 Cong. Rec. S7804 (1995) (Sen. Hatch); 141 Cong. Rec. S7807 (1995) (Sen. Hatch); 141 Cong. Rec. S7823 (1995) (Sen. Abraham).

Congress also recognized that the effects of delay are particularly pernicious in capital cases, where a state prisoner can and frequently does frustrate "the States' sovereign power to punish offenders." *Engle v. Isaac*, 456 U.S. at 128; *see* 141 Cong. Rec. S7823 (1995) (Sen. Abraham). Congressional supporters of the bill thus sought to end the "de facto nullification of capital punishment laws" by defendants who "have fully exploited the system's potential for obstruction." 141 Cong. Rec. S7822 (1995) (Sen. Nickles).

Disturbed by these effects of delay, Congress sought to forcefully address them by imposing a one-year limitations period on all petitions.[2] Under the provision, a prisoner in custody pursuant to a state judgment of conviction has one year to file a habeas corpus petition from the latest of four dates: the date on which direct appellate review of the judgment was completed, the date on which a state-created impediment to filing is lifted, the date on which a retroactively effective change in constitutional law is recognized, or the date on which the facts underlying the claim were known or could have been known with due diligence. 28 U.S.C. §2244(d)(1).

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[2]Congress enacted a separate, shorter statute of limitations to apply in capital cases if a state establishes a mechanism for the appointment of counsel for post-conviction review as well as for direct appellate review. 28 U.S.C. §§2261, 2263. No state has yet effectively "opted-in" to these provisions. When capital cases are not governed by the opt-in provisions, the one-year statute of limitations applies to them. *See* §2244(d) (one-year statute of limitations applies generally to any "application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court"); 2 James Liebman and Randy Hertz, Federal Habeas Corpus Practice and Procedure §5.1b at 228 (3d ed. 1998).

In imposing this limitations period, however, Congress also recognized the necessity of allowing for the exhaustion of state remedies. *See* 28 U.S.C. §2254(b); H.R. Conf. Rep. No. 104-15 at 111, 1996 U.S.C.C.A.N. at 944. The exhaustion doctrine is designed to "minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981). The doctrine advances the interests of comity, recognizing that state judiciaries are equally bound to uphold the federal constitution. *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Ex Parte Royall*, 117 U.S. 241, 251 (1886). It also promotes state courts' familiarity with federal constitutional issues, and it helps ensure that federal claims are accompanied by a complete factual record, including factual findings that may then be entitled to a presumption of correctness in federal court. *Rose v. Lundy*, 455 U.S. at 519.

Because the exhaustion of state court remedies can often be a time-consuming process, there is tension between the goals of ensuring full exhaustion and reducing delays: the more extensive the state court filings, the greater the delays in achieving finality. *See* Mark Tushnet & Larry Yakle, Symbolic Statutes and Real Laws, 47 Duke L. J. 1, 29 (1997). Congress sought to balance these competing concerns. *See* H.R. Rep. No. 104-23 (1995) (Judiciary Committee) (the statute of limitations provisions are designed to "curb the lengthy delays in filing that now often occur in federal habeas corpus litigation, while preserving the availability of review when a prisoner diligently pursues state remedies and applies for federal habeas review in a timely manner").[3] The legislation allows for exhaustion of

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[3]This report of the House Judiciary Committee accompanied H.R. 729, an immediate precursor of AEDPA in the same Congress. That bill contained the identical statute of limitations enacted under AEDPA for state prisoners in non-capital cases seeking section 2254 relief.

state remedies in two ways: by commencing the limitations period, at the earliest, after the direct appellate review process is over, *see* §2244(d)(1)(A), and by enacting a tolling provision for "properly filed" state post-conviction applications seeking review of the conviction, *see* §2244(d)(2); *Mills v. Norris*, 187 F.3d 881, 883-84 (8th Cir. 1999); Tushnet & Yakle, *supra*, at 30. While the former provision has engendered little debate, the latter has been the subject of much litigation and has resulted in widely varying interpretations among the circuit courts. Unfortunately, as several of the lower courts have noted, Congress provided little guidance on the meaning of "properly filed": the statute nowhere defines the term and the legislative history fails to articulate what Congress may have meant by this language. *See* H.R. Conf. Rep. 104-518; *Villegas v. Johnson*, 184 F.3d 467, 470 (5th Cir. 1999); *Hughes v. Irvin*, 967 F.Supp 775, 778 (E.D.N.Y. 1997). Congress thus left to this Court the task of defining the term.

In construing "properly filed," the Court should look to the purposes of the statute of limitations and the tolling provision and attempt to arrive at "an interpretation that achieves some rough peace between section 2244(d) and the exhaustion requirement." Tushnet & Yakle, *supra*, at 30. This approach is consistent with both this Court's prior habeas jurisprudence and with well-established principles of statutory construction. This Court has in the past resolved disputes concerning the meaning of Congress's habeas legislation by considering the purposes sought to be achieved. *See Rose v. Lundy*, 455 U.S. at 510 (holding that mixed petitions must be dismissed "[b]ecause a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statute . . . ."). And time-honored principles of statutory interpretation counsel the same inquiry. *See Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."); *United States*

*v. Bacto-Unidisk*, 394 U.S. 784, 799 (1969) ("where the statute's language seems insufficiently precise, the 'natural way' to draw the line 'is in light of the statutory purpose'").

The Second Circuit's interpretation, however, fails to take into account the competing considerations underlying the statute of limitations and the tolling provision and certainly fails to achieve any "rough peace" between them.

**A. The Second Circuit's Interpretation of "Properly Filed" Eviscerates the Statute of Limitations by Allowing State Prisoners to Extend the Limitations Period Indefinitely; It also Extends the Tolling Provision Far Beyond Its Purpose and Significantly Undermines State Procedural Rules.**

The Second Circuit held that the tolling provision suspends the limitations period whenever a prisoner files any application for post-conviction review "recognized as such" by the state courts, whether or not the prisoner has made any effort to comply with state procedural rules and regardless of whether the state court could possibly hear the merits of the claim. In fact, this interpretation would appear to include virtually any application that a state court clerk could discern was directed at a particular judgment of conviction. This formulation is dangerously inadequate because it allows for unnecessary and harmful delays, goes far beyond the purpose of the tolling provision, and seriously undermines state procedural rules.

First, the Second Circuit's interpretation would allow state prisoners to obtain the benefit of tolling for entirely repetitive, procedurally barred applications in state court that serve no purpose other than delay. Petitioners routinely file such motions in state court, sometimes to the point of absurdity, and these applications engender years, if not decades, of delay in a very significant number of cases. *See* Victor Flango & Patricia McKenna, Federal Habeas Corpus Review of State

Court Convictions, 31 Cal. W. L. Rev. 237, 245 (1995) (fifty percent of state collateral attacks studied were brought by prisoners filing their third or subsequent petition); *see also, e.g., In re Sindram*, 498 U.S. 177 (1991) (petitioner who received speeding ticket challenged conviction in 27 motions in state and federal court and filed 43 separate petitions and motions in this Court); *In re McDonald*, 489 U.S. 180 (1989) (state prisoner sought relief from conviction by filing 73 applications over 18 years). The Second Circuit's interpretation, however, would afford tolling for these repetitive, procedurally barred state applications regardless of whether the application was the prisoner's first or fiftieth and regardless of the number of procedural rules the prisoner had violated. *See Hughes v. Irvin*, 967 F.Supp. at 777-79 (affording tolling for petitioner's seventh motion to vacate judgment in the trial court).

Still more disturbing is that by filing such motions, a state prisoner could extend the statute of limitations at will. The state prisoner could, in fact, indefinitely enlarge the limitations period by the simple expedient of filing motion after motion, even if all of his claims have already been raised and decided adversely to him. This prospect is particularly alarming as applied to capital defendants, who have a powerful interest in delay. There can indeed be no question that capital defendants have a truly compelling incentive to postpone the imposition of the death penalty and to use every possible tool to do so. Yet, under the Second Circuit's interpretation, a capital defendant need only re-file an old, already procedurally barred motion in order to generate delay. Such automatic delays in capital cases "frustrate . . . the States' sovereign power to punish offenders," *Engle v. Isaac*, 456 U.S. at 128, by preventing the state from carrying out the sentences imposed pursuant to presumptively valid state court judgments of conviction. Still worse, they do so even when the state procedure that has been invoked does nothing to advance any claim, whether meritorious or not, that the defendant may have.

Congress could not have intended to tolerate such delays or to effectively eviscerate the limitations period, particularly as applied to capital defendants. Extending the limitations period for so long, and perhaps even indefinitely, is directly contrary to the general purpose that underlies all statutes of limitations. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997) (rejecting interpretation of statute of limitations that "lengthen[ed] the limitations period dramatically" such that it was "longer than Congress could have contemplated" because the lengthy additional delay "conflicts with a basic objective . . . that underlies limitations periods"). Moreover, it would not be logical to assume that Congress, in enacting any statute of limitations, would place in the hands of the party against whom the limitations period is to run the power to extend the statute indefinitely. If a statute of limitations is to have any purpose or effect at all, the invocation of the tolling provision cannot be at will; it must be limited in some meaningful way. *See Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 20 (1995) ("It is an elementary rule of construction that 'the act cannot be held to destroy itself'") (quoting *Texas and Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)).

More important, as to AEDPA's statute of limitations specifically, the legislation's sponsors and supporters could not have made clearer that it was precisely such needless and frequently manipulative delays that Congress sought to control. Indeed, Senator Dole, one of AEDPA's primary sponsors, introduced the bill on the floor of the Senate by stating that it would prevent habeas petitioners from "gaming the system – with more delays, more unnecessary appeals, and more grief for the victims of crime and their families." 141 Cong. Rec. S5841 (1995). And Congress made particularly clear with regard to capital prisoners that it sought to end the process by which "criminals are able to delay the imposition of capital sentences indefinitely." 141 Cong. Rec. S7823 (1995) (Sen. Nickles). It cited what it believed were shocking delays in executions,

particularly delays due to repetitive litigation, *see, e.g.*, 141 Cong. Rec. S7804 (1995) (Sen. Hatch); 141 Cong. Rec. S7820 (1995) (Sen. Nickles), and expressed its feeling that such delays "exploited the system's potential for obstruction" and constituted "a de facto nullification of capital punishment laws." 141 Cong. Rec. S7822 (1995) (Sen. Nickles). Yet, under the Second Circuit's interpretation of the tolling provision, no change would occur for these capital prisoners, who would have the means to delay just as long as they could have previously.

Second, the Second Circuit's interpretation extends the scope of the tolling provision far beyond its purpose of allowing the exhaustion of state remedies. The exhaustion doctrine precludes federal review of a claim not presented to the state courts because it would be inappropriate "to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Darr v. Burford*, 339 U.S. 200, 204 (1950). While exhaustion thus requires that the state courts be given an opportunity to address the claim if desired, it does not require presenting a claim to state courts when the claim is mandatorily barred under state procedural rules. To the contrary, this Court has repeatedly held that the exhaustion doctrine does not require giving a state court an opportunity to consider a claim that is procedurally barred in state court. *See, e.g., Gray v. Netherland*, 518 U.S. 152, 161 (1996); *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1 (1991); *Teague v. Lane*, 489 U.S. 288, 297-99 (1989); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 847-48 (1999). Similarly, this Court has held on many occasions that exhaustion does not require repetitious litigation. *See, e.g., Roberts v. LaVallee*, 389 U.S. 40, 42 (1967); *Brown v. Allen*, 344 U.S. 443, 487 (1953). Yet the Second Circuit's interpretation would, in the supposed furtherance of exhaustion, allow tolling for a virtually infinite variety of post-conviction applications that do nothing to advance exhaustion, even when those applications are

repetitious and designed to cause delay and even though the state has imposed a strict rule barring such litigation tactics.

Nor does the Second Circuit's interpretation foster the principles underlying the exhaustion doctrine. Comity, and the need to avoid friction with state courts, does not require giving state courts an opportunity they do not wish to have. Indeed, friction with state courts will much more likely result from the Second Circuit's interpretation than from a contrary one because the Second Circuit's view encourages repetitious, procedurally barred state applications that waste the resources of the state courts and cause delays that the state has sought to avoid. Furthermore, a state court that cannot hear the merits of a claim will not become more familiar with federal constitutional law; it will simply repeat its own state procedural law. Similarly, a state court that will clearly find an issue procedurally barred will not conduct a hearing on the federal claim, and thus the federal claim will not be accompanied by a more complete record. Thus, exhaustion in no way requires the type of limitless tolling permitted by the Second Circuit.

Moreover, a defendant has no independent federal right to file state post-conviction motions, particularly ones that are procedurally barred under state law. *See Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). State procedures, like federal procedures, that are "adopted to facilitate the orderly consideration and disposition of [post-conviction] petitions are not legal entitlements that a defendant has a right to pursue irrespective of the contribution these procedures make toward uncovering constitutional error." *Barefoot v. Estelle*, 463 U.S. 880, 887-88 (1983). Thus, Congress did not have any constitutional restraint requiring it to allow tolling for state proceedings that the state did not wish to provide.

Third, the Second Circuit's interpretation draws the line between unnecessary delays and exhaustion at a place that has

no substantive significance in any habeas doctrine and that, thus, provides no logical rationale for distinguishing between petitioners who deserve to be denied the benefits of the tolling provision and those who do not. Under the Second Circuit's interpretation, a state clerk's recognition of the prisoner's document as a post-conviction application and his or her decision to treat it as such will likely determine a petitioner's access to federal court. A prisoner's unfortunate labeling of a document or a poor turn of phrase in the application may cause the prisoner to be denied the benefit of tolling while a form application re-filed with the court for the tenth time will result in the full suspension of the limitations period. These differences cannot be justified. Similarly, because the Second Circuit's interpretation requires compliance with rudimentary filing procedures only, such matters as the number of copies filed and presence or absence of a notary stamp may be dispositive of a prisoner's access to federal court, as may the clerk's decision to overlook the technical requirements in a given case. These distinctions between worthy and unworthy applications are arbitrary and capricious at best.

Fourth, the Second Circuit's interpretation directly undermines state procedures that are entitled to deference and respect under principles of federalism that are at the very core of this Court's habeas corpus jurisprudence. Indeed, federalism is a central pillar upon which this Court's habeas decisions rest, *see, e.g., Coleman*, 501 U.S. at 726; *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977), and respect for, and deference to, state court determinations is undoubtedly at the heart of the reforms Congress intended to effect in enacting AEDPA. And, as this Court has made clear on many occasions, federalism requires that federal courts refrain from undermining state procedural rules that are designed to limit state litigation and channel limited judicial resources toward more meritorious claims. *See, e.g., Coleman*, 501 U.S. at 726; *Engle*, 456 U.S. at 129 (federal courts should avoid "undercutting the State's ability to enforce

its procedural rules."); *Wainwright*, 433 U.S. at 88-91 (state rule deserves respect because it is "employed by a coordinate jurisdiction within the federal system" and because it serves important state interests in requiring early resolution of federal claims).

But the Second Circuit's interpretation ignores the states' procedural mechanisms and indeed encourages state prisoners to ignore them as well to avoid the preclusive effect of the statute of limitations. It plainly gives prisoners, particularly capital ones, an additional incentive to abuse the states' processes. As a result, the states' carefully considered procedural mechanisms, which are barely capable of containing unnecessary post-conviction litigation as it is, are subject to further abuse as state prisoners file unreviewable, purposeless motions in an effort to delay anticipated federal proceedings. While nothing in the traditions of habeas corpus requires it, this interpretation forces state courts to "'tolerate needless piecemeal litigation, [and] to entertain collateral proceedings whose only purpose is to vex, harass, or delay.'" *Rose v. Lundy*, 455 U.S. at 521 (quoting *Sanders v. United States*, 373 U.S. 1, 18 (1963)). Thus, under the Second Circuit's interpretation, the states not only lose the benefit of the statute of limitations in many cases, they must also suffer the frustration of having their efforts at controlling needless post-conviction litigation ignored and thereby subverted. And the states must then suffer the added injury of spending the extra resources necessary to deal with the additional post-conviction litigation spawned by the rule.

In the end, it can hardly be maintained that Congress, in enacting the tolling provision, intended to create a rule that undermines its own efforts at curbing delays, extends tolling to repetitious litigation that does not serve any conceivable purpose of exhaustion, effects virtually no change for capital prisoners, and undermines state efforts at curbing post-

conviction litigation. The Court then should look for a more rational meaning to the terms at issue, one that is more consistent with the purposes of the statutory provisions and that does not lead to consequences that Congress did not intend and would not condone.

**B. An Interpretation that Denies Tolling for Post-Conviction Applications that Are Procedurally Barred Under State Law Curbs Unnecessary Delays, Amply Allows for Exhaustion of State Remedies, and Shows Respect for State Procedural Rules in a Manner that Promotes Principles of Comity and Federalism.**

The dramatic deficiencies in the Second Circuit's interpretation of "properly filed" may be rectified with relative ease. Tolling only for post-conviction applications that a state court can hear on the merits under state procedural rules substantially limits delays in reaching federal court, eliminates from tolling only applications that could not serve the purposes of exhaustion in any event, and gives full effect to state procedural rules, as federalism requires.

First, an interpretation that tolls only for applications that can be heard on the merits does not suspend the limitations period for mandatorily barred petitions, and thus eliminates the delays that would otherwise rapidly accumulate during vexatious, dilatory post-conviction litigation. Curbing these substantial periods of delay, which would go entirely unchecked under the Second Circuit's interpretation, would substantially shorten the time it takes to get to federal court. Moreover, unlike the Second Circuit's interpretation, this interpretation does not place in the hands of state prisoners, particularly capital prisoners, the power to extend the limitations period at will by simply filing repetitive motions. State courts can use their procedural rules to control such applications, and capital prisoners will gain no benefit from ignoring the states' rules.

Second, denying the benefit of tolling only for applications that cannot be heard on the merits eliminates from the scope of the provision only applications that cannot serve the purposes of exhaustion. If an application is mandatorily procedurally barred under state law, it is "unavailable" and therefore unnecessary to exhaust the prisoner's state remedies. *See Gray v. Netherland*, 518 U.S. at 161; *Teague*, 489 U.S. at 297-98. Such a rule also fully respects the principles underlying the exhaustion requirement, because it allows state courts an opportunity to hear the merits of the claim unless they have already indicated through their procedural rules and decisions that they do not desire that opportunity. And only claims that the courts will hear on the merits can help familiarize the state courts with federal constitutional principles and will result in factual findings that will be helpful to the federal courts in resolving the federal constitutional issue.

Third, an interpretation that tolls the statute only for motions that can be heard on the merits links the tolling provision to its purpose, exhaustion, and thereby draws the line between applications that are worthy of its benefits and those that are unworthy at a logical and appropriate place. Applications that are mandatorily procedurally barred under state law and thus clearly do not advance the purposes of exhaustion do not get the benefit of the tolling provision, while those that do advance the purposes of exhaustion do get its benefits. And this line of demarcation not only advances the purposes of exhaustion while eliminating unnecessary delays, it promotes uniformity in habeas law and practice. It places the new tolling provision in the larger context of this Court's habeas corpus jurisprudence and allows courts to draw on established doctrines and prior cases to give meaning to it.

Fourth, an interpretation of "properly filed" that tolls only for applications that can be heard on the merits accords full respect to state court procedural rules. By denying tolling for

procedurally barred applications, the federal courts defer to the procedural laws of the states, as federalism requires, and give effect to the states' attempts through the use of those laws to control post-conviction litigation. Prisoners are encouraged to comply with state rules, instead of benefitting from disregarding them. And repetitive petitions that would otherwise be filed, particularly in capital cases, to create delay and extend the limitations period will not consume the resources of the state courts and prosecutors.

Thus, an interpretation of the tolling provision that suspends the limitations period only for applications that can be heard on the merits in state court strikes the balance between curbing delays and allowing for exhaustion, and achieves a "rough peace" between these conflicting goals. If a state allows a court to hear a post-conviction claim, and a defendant avails himself of that avenue of relief, the statute must be tolled. But if a defendant attempts to file an application in a court that clearly cannot hear its merits under state procedural rules, then the purpose of exhaustion is not served and the purpose of the limitations period can be advanced.

This interpretation thus encourages a defendant to fairly exhaust his state remedies and proceed to federal court as quickly as possible. It does not, however, benefit prisoners who file repetitive applications, mandatorily precluded under state law, that further neither the goal of exhaustion nor the goal of swift and final determinations, and that cause the excessive delays that the statute of limitations was directed against. In this way, this interpretation harmonizes the goals of the tolling provision with the goals of the statutory limitations period and with well-established principles of habeas corpus jurisprudence.

**C. The Objections to an Interpretation That Denies Tolling for Barred Post-Conviction Applications Are Insubstantial and Do Not Outweigh its Benefits.**

Lower federal courts and commentators have raised several objections to an interpretation of "properly filed" that denies tolling for mandatorily barred post-conviction applications. Some of them have complained that such an interpretation would involve the federal courts in an inappropriate and burdensome examination of state procedural rules and would "engraft" a "merits inquiry" onto the statute. Others have complained that such a rule would be too harsh on petitioners, and that prisoners who are wary of these harsh effects will flock to federal court rather than exhaust their state remedies. Finally, some courts have suggested that the delays identified with an interpretation that affords tolling for procedurally barred post-conviction applications are insignificant and that states could adopt new procedural rules that help minimize such delays. These arguments are fundamentally flawed in many ways. Moreover, any concerns that they raise about denying tolling for procedurally barred post-conviction applications are outweighed by the benefits of such an interpretation.

First, in its decision below, the Second Circuit protested that a rule that limits tolling to motions that could be heard on the merits would require federal courts to examine the procedural rules of the state, which, the court asserted, are often difficult to interpret. *See Bennett*, 199 F.3d at 122. But well-established doctrines of habeas jurisprudence, most notably the exhaustion doctrine itself, already require an examination of, and respect for, state procedural rules. In determining whether to dismiss a petition for failure to exhaust state remedies or to deem the claim procedurally barred, the federal courts already look to the same state procedural rules that they would have to apply under the tolling provision. *See Teague*, 489 U.S. at 297-

98; *Gray*, 518 U.S. at 161. This Court has, in fact, made such determinations on several occasions in ascertaining the availability of state remedies for exhaustion purposes. Thus, for example, this Court in *Teague*, in deciding whether the habeas petitioner had a remedy available under state law, considered the Illinois Post-Conviction Procedure Act and cases interpreting it to conclude that because the habeas petitioner had failed to raise his claim on direct review, he could not raise it on collateral review in the Illinois courts. 489 U.S. at 297. Similarly, in *Gray v. Netherland*, this Court applied procedural provisions of the Virginia Code to conclude that the habeas petitioner had defaulted the state remedy for his *Brady* claim because he had failed to raise it in a prior state petition and, under Virginia law, could not raise it in a second petition. 518 U.S. at 161; *see also Breard v. Greene*, 523 U.S. 371 (1998).

And, of course, lower federal courts have made similar determinations concerning the procedural rules of the various states on a quite routine basis. *See* Liebman and Hertz, §5.1b n. 64 at 236. For example, despite the Second Circuit's protests that it would have difficulty applying the procedural bars at issue in this case, it has applied these rules with no trouble on a number of occasions in its published opinions, much less its unpublished ones, in order to determine whether a claim was unexhausted or should be deemed procedurally barred under state law. *See, e.g., Strogov v. Attorney General*, 191 F.3d 188, 193 (2d Cir. 1998); *Jackson v. Leonardo*, 162 F.3d 81, 84 and n.7 (2d Cir. 1998); *Bossett v. Walker*, 41 F.3d 825, 829 (2d Cir. 1994), *cert. denied*, 514 U.S. 1054 (1995); *Washington v. James*, 996 F.2d 1442, 1446-47 (2d Cir. 1993), *cert. denied*, 510 U.S. 1078 (1994); *Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir. 1991). Indeed, the Second Circuit has interpreted in these cases the very words from the state statute that were cited in the court's opinion below as too difficult to apply. *See Reyes v. Keane*, 118 F.3d 136, 140 (2d Cir. 1997) (applying "unjustifiable failure" language of statute and rejecting

contention that ineffectiveness claim could not have been raised on the record); *Caballero v. Keane*, 42 F.3d 738, 740-41 (2d Cir. 1994) (deciding that ineffectiveness claim was off the record and a remedy was available in state court). And the District Courts in New York have applied these same rules on countless occasions. *See, e.g., Moates v. Walker*, 929 F.Supp. 82, 86 (E.D.N.Y. 1996); *Meachem v. Keane*, 899 F.Supp. 1130, 1138 (S.D.N.Y. 1995); *Bacchi v. Senkowski*, 884 F.Supp. 724, 731 (E.D.N.Y. 1995), *aff'd*, 101 F.3d 683 (2d Cir.), *cert. denied*, 519 U.S. 894 (1996).

Moreover, the federal courts could use this pre-existing body of case law interpreting the states' procedural rules in applying the tolling provision. *See Hill v. Keane*, 984 F.Supp. 157, 158-59 (E.D.N.Y. 1997). A federal court thus ordinarily need look no further than its own decisions to apply a state's already familiar procedural rules. And using these cases defining the scope of the exhaustion doctrine as guideposts will ensure that the tolling provision is interpreted in accordance with its purpose: to allow petitioners to exhaust their state remedies. Thus, the Second Circuit's assertion that it would be difficult and inappropriate for federal courts to apply state procedural rules is belied by current habeas law and practice.

The second objection commonly raised to an interpretation that denies tolling for procedurally barred post-conviction applications is that it would "embroil" the federal courts in an evaluation of the "merits" of state applications. *Villegas v. Johnson*, 184 F.3d at 469-70; *see Bennett*, 199 F.3d at 122; *Lovasz v. Vaughn*, 134 F.3d 146, 149 (3d Cir. 1998). In some instances, this argument appears to be simply a restatement of the reluctance to review state post-conviction applications to make determinations on state procedural questions, *Bennett*, 199 F.3d at 122, while in others it appears to represent an independent fear of reviewing the true merits of the underlying claims, *see Lovasz v. Vaughn*, 134 F.3d at 149.

As to the former, the objection is no different from the one above, and is unavailing for the reasons stated above. As to the latter, the courts' fear is misplaced.

It is true that some early cases held or suggested that a petition must be "non-frivolous" in order to be properly filed, thereby implying that a review of the actual merits of the underlying claims would be necessary. *See Valentine v. Senkowski*, 966 F. Supp. 239, 241 (S.D.N.Y. 1997); *see also Villegas v. Johnson*, 184 F.3d at 469-70. Indeed, the objections to a "merits" inquiry appear to be in response to these cases. But the position advanced here and before the Second Circuit does not seek to exclude all "frivolous" petitions, only petitions that are mandatorily procedurally barred under state law. The federal courts thus need not review the merits of claims raised in state petitions, they need only apply well-established, and quite familiar, procedural rules.[4]

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[4]Ordinarily, this inquiry would entail an examination of such matters as whether an application was timely, whether a claim was raised or could have been raised on direct appeal, or whether the claim was raised or could have been raised in a prior petition. Indeed, in this case, only a simple inquiry of this nature would have been required, not any determination of the merits. As to these common procedural rules then, no "merits" inquiry is required.

Moreover, even if a procedural rule has a "safety valve" for particular types of claims or cases where manifest injustice may occur, the court applying the rule need inquire into the merits only to the same extent that it would already do so in deciding for exhaustion purposes whether a state court would entertain the claim. For example, in *Teague*, this Court noted that the Illinois procedural bar at issue had an exception for "fundamental unfairness," but determined that the state court would clearly not consider defendant's type of claim within this exception. 489 U.S. at 297-98. Federal courts need make no different or more intrusive examinations than this on the "merits," and the courts need not fear being "embroil[ed] . . . in problematic determinations of the merit of state court filings", *see Villegas*, 134 F.3d at 471, to any greater degree than they are already. *See also id.* at 475 (Garza, J., dissenting).

Nor can it be claimed that the plain language of the tolling provision compels the Second Circuit's interpretation, or that an understanding of the tolling provision that requires respect for state procedural rules would "engraft"something new onto the statute that Congress did not intend. To the contrary, the word "proper" ordinarily denotes "strictly accurate" or "correct," *Merriam Webster Collegiate Dictionary* 935 (10th ed. 1995), and a post-conviction application that fails to comply with mandatory state procedural rules cannot be considered to be either "correct" or "strictly accurate." Moreover, this Court has often used the term "properly" in discussing the exhaustion and procedural default doctrines to refer to claims presented to state courts in accordance with state procedural rules. *See, e.g., O'Sullivan v. Boerckel*, 526 U.S. at 848; *Harris v. Reed*, 489 U.S. 255, 265 (1989). These references also support the conclusion that only a post-conviction motion complying with all mandatory state procedural rules is "proper" and warrants tolling.

At least one court has nevertheless suggested that a literal reading of the statutory provision requires an interpretation that tolls even for procedurally barred motions, and that because the meaning of the terms are plain and unambiguous, no further inquiry is necessary or appropriate. *See Galindo v. Johnson*, 19 F.Supp.2d 697, 700-702 (W.D. Tex. 1998). But, there is, at the very least, sufficient ambiguity in the term "properly" to justify an inquiry into Congress's objectives in enacting the statutory provisions. *See* Liebman and Hertz, §5.1b n. 64, at 236 ("determining whether a state postconviction petition has been 'properly filed' is likely to be a source of substantial litigation, given the phrase's ambiguity"); Tushnet & Yakle, *supra*, at 30. Indeed, this ambiguity is amply demonstrated by the vast array of interpretations in the circuit courts, which differ so dramatically in the scope afforded the

tolling provision.[5] And, even if a literal reading of the terms could be said to support tolling for procedurally barred motions, a literal application of the language would not be required in a case such as this, where it would so thoroughly undermine, and indeed contravene, the obvious purposes of the statute.[6]

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[5]Some courts interpreting the language have allowed tolling for virtually any post-conviction application filed, including those barred by state successive petition rules and ones that are untimely under state law. *See Bennett*, 199 F.3d at 123. Others have interpreted the terms to allow tolling for most state applications, but at least nominally not ones that fail to comply with rules concerning the "time and place of filing." *See Villegas v. Johnson*, 184 F.3d at 470 n. 2; *Lovasz*,134 F.3d at 148; *see also Habteselassie v. Novak*, 209 F.3d 1208, 1212 (10th Cir. 2000). At least one other court has announced a rule that would deny tolling for applications that are untimely, but has held that it would nevertheless grant tolling if the state's time bar contained any exception at all. *Smith v. Ward*, 209 F.3d 383, 385 (5th Cir. 2000). Still other courts have declined to allow tolling for any application that a state court has held is procedurally defective. *See Freeman v. Page*, 208 F.3d 572, 576-77 (7th Cir. 2000); *Weekley v. Moore*, 204 F.3d 1083, 1086 (11th Cir. 2000); *Dictado v. Ducharme*, 189 F.3d 889, 892 (9th Cir. 1999).

[6]This Court has stated on many occasions that a literal application of statutory language is not required when it would "produce a result demonstrably at odds with the intentions of its drafters," *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989) (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)), or when it "'would thwart the obvious purpose of the statute,'" *Commissioner v. Brown*, 380 U.S. 563, 571 (1965); *Helvering v. Hammel*, 311 U.S. 504, 510-511 (1941). The Court, of course, has declined to apply this rule when "no such consequences would follow and where . . . [a literal application] appears to be consonant with the purposes of the Act," *Brown*, 380 U.S. at 571 (quoting *Helvering*, 311 U.S. at 511). But here, the Second Circuit's interpretation would, as a practical matter, eliminate the operational effect of the statute of limitations as applied in capital cases, and, by this fact alone, produce a result "demonstrably at odds" with the intentions of its drafters.

Still, some courts have asserted that if Congress had intended to deny tolling for procedurally barred claims, it would have done so specifically. *Bennett*, 199 F.3d at 122; *Villegas*, 184 F.3d at 470. The force of this observation is all the greater, it is claimed, because the interpretation restricts the scope of the writ and gives greater preclusive effect to procedurally barred claims, thereby "alter[ing] the legal landscape." *Villegas*, 184 F.3d at 470. These arguments are unavailing. As an initial matter, Congress unquestionably sought to "alter the legal landscape" concerning access to federal court by enacting the statute of limitations. Indeed, in many ways it created a new legal landscape that did not previously exist. And while the statute must function appropriately in the existing scheme of habeas law and practice, an interpretation like the one advanced here, which makes the tolling provision consistent with exhaustion and which respects the procedural rules of the states, is more consonant with prior law than is one like the Second Circuit's, which divorces the tolling provision from exhaustion and ignores the states' procedural laws. In short, the question is not whether Congress intended to alter the legal landscape, it is whether the Second Circuit's interpretation effects a change in the landscape in a meaningful way.

Furthermore, there is no question that Congress could have been more specific in defining the scope of the tolling provision and giving an indication of which of the possible interpretations identified by courts and commentators it meant to be applied. It unfortunately failed to do so, either because its members could not agree on a definition, or because the types of state procedures that could be invoked were so varied that Congress felt it was best to leave the application of the provision to the courts. In either event, the absence of specificity, by itself, does not resolve the question of what Congress intended; it simply makes clear that this Court has been left the task of applying the provision in a manner consistent with the aims of both the statute of limitations and the tolling provision.

The third objection sometimes noted to an interpretation that denies tolling for procedurally barred applications is that it would be overly harsh on state prisoners, either because of their lack of knowledge or because some litigants may have a reasonable belief that in their particular case, the state court may decide not to apply the procedural bar at issue. These prisoners, the argument goes, may deplete the limitations period on a claim, raised in good faith, that is eventually held to be procedurally barred. *See Habteselassie*, 209 F.3d 1208, 1212 n.5 (10th Cir. 2000); Liebman and Hertz, §5.1b n. 64 at 236; *see also Freeman v Page*, 208 F.3d 572, 576 (7th Cir. 2000) (rejecting "subjective" test of properly filed). But, as to the former concern, habeas law has traditionally imposed on petitioners a requirement of knowledge of the law, often with regard to rather complex rules of habeas procedure. More specifically, both the Court's procedural default and abuse-of-the-writ jurisprudence "impose on petitioners a burden of reasonable compliance with procedures designed to discourage baseless claims and to keep the system open for valid ones . . . ." *McCleskey v. Zant*, 499 U.S. at 493. The interpretation of the tolling provision advanced here does no more. It requires only knowledge of the states' procedural bars in the post-conviction context, which petitioners are, in any event, charged with knowing under the procedural default doctrine.

Moreover, a petitioner who files a state post-conviction application with an arguably valid contention that a state court might overlook the procedural bar need not fear the statute of limitations under the interpretation advanced here. If a petitioner colorably invokes an exception to the state's procedural bar, or if the state courts regularly overlook the procedural bar in order to review claims such as the petitioner's, the ambiguity should be resolved in favor of the petitioner. This is consistent with the treatment that such an ambiguity would receive if the federal court were reviewing the claim to determine whether the petitioner must return to state court to

exhaust the claim or whether it should be deemed procedurally barred. *See Castille v. Peoples*, 489 U.S. 346, 349 (1989) (noting presumption in favor of exhaustion); *Granberry v. Greer*, 481 U.S. 129, 131 (1987) (same); Liebman and Hertz §23.1 at 868. In the exhaustion context, if there is a legitimate reason to believe the state court will hear a claim despite a potential procedural bar, the claim is unexhausted and the petitioner will be required to return to state court for this purpose. *See Caballero*, 42 F.3d at 740-41; *Banks v. Horn*, 126 F.3d 206, 212-13 (3d Cir. 1997); *Sloan v. Delo*, 54 F.3d 1371, 1381 (8th Cir. 1995), *cert. denied*, 516 U.S. 1056 (1996). Indeed, in applying the very procedural bar at issue in this case, the Second Circuit has found claims unexhausted when a defendant has made such colorable arguments. *See Caballero*, 42 F.3d at 740-41. In such circumstances, the petitioner would necessarily get the benefit of the tolling provision.[7] Resolving such disputes in this manner keeps the tolling provision true to the purposes of exhaustion, provides federal courts with a pre-existing body of case law to aid in determining such matters, and protects petitioners with objectively reasonable grounds to believe that a state procedural bar will not be applied.

The fourth objection sometimes raised to an interpretation that gives effect to state procedural bars is that it will make prisoners wary of filing their claims in state court, causing them to flock to federal court prematurely and discouraging exhaustion. *See Villegas*, 184 F.3d at 472. But petitioners need not fear exhausting state remedies under the

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[7]Moreover, should the circumstances of a future case require it, this Court could adopt other means to protect prisoners who were unfairly disadvantaged by the rule. For example, where the issue is presented, this Court may well conclude that the statute may be equitably tolled. Several of the Courts of Appeals have already so concluded. *See Smith v. McGinniss*, 208 F. 3d 13, 17 (2d Cir. 2000) (adopting equitable tolling and citing other circuit court cases doing the same).

interpretation advanced here. Any legitimate or even arguably legitimate attempt to exhaust state remedies will result in tolling. So, for example, a petitioner in New York who raises a typical *Brady* or newly discovered evidence claim, or a claim of ineffective assistance of counsel based on events that did not occur in court, can invoke the state's post-conviction processes without any legitimate concern. The state's rules fully allow such claims to be brought post-appeal, and no issue will arise regarding tolling in these cases. Indeed, most states' post-conviction rules would allow for a first post-conviction application based on matters that are outside the record, which would allow prisoners to bring many of the most typical post-conviction claims and obtain tolling for these state applications. Moreover, even when a state procedural rule is arguably applicable, a petitioner need not be concerned with exhausting his state remedies so long as he or she can point to an exception to the procedural bar that he or she has reasonably invoked, or to other state cases that have ignored the bar to hear a claim similar to the petitioner's. In such circumstances, the petitioner will obtain the benefit of tolling. Only when a petitioner is clearly barred from proceeding under state law and engages in unnecessary or repetitious litigation should the petitioner fear state court procedural rules, and such prisoners are quite properly encouraged to proceed directly to federal court rather than invoking unavailable processes of the state courts.

Moreover, as a practical matter, it seems unlikely that petitioners who now routinely engage in extensive post-conviction litigation in the state courts will abandon all such efforts, avoiding any attempt at invoking any state procedure, and flock to federal court with premature petitions. Properly invoked state remedies routinely offer viable avenues of relief to prisoners, and foregoing these possible remedies would not be in the prisoner's best interests.

Of course, some petitioners who seek to ensure compliance with the statute of limitations may file premature petitions within one year of the time their convictions become final, regardless of the status of the state litigation. Indeed, any statute of limitations would result in some cautious prisoners taking this tack. But the Court has already afforded a procedure for such premature petitions. Under *Rose v. Lundy*, the federal court need only dismiss the petition without prejudice. 455 U.S. at 522. And, under the interpretation advanced here, a petitioner in this situation is assured that he or she will obtain the benefit of tolling because there will already be a determination on the facts of petitioner's case that the state proceeding is necessary for exhaustion, and thus tolling would be warranted.[8]

The Second Circuit and other courts have nevertheless apparently found the *Rose v. Lundy* remedy inadequate. The court asserted that deciding whether to dismiss a case on exhaustion grounds is often not "clear-cut," and that a prisoner who seeks to ensure timeliness by filing prematurely within the one-year limitations period would require federal courts to make "determinations as to the proper outcome of pending state proceedings based on state law when a state court is positioned to make the very same decision." *Bennett*, 199 F.3d at 122; *see also Habteselassie*, 209 F.3d at 1212 n.6. But this would be an unusual case. Here again, the dire predictions of flight to federal court are overstated, and in most cases, federal courts would examine the state procedural rule after the state proceedings are completed. Moreover, even when petitioners do hasten to

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[8]Indeed, the states would be forced in such cases to make an election. They could either argue that the claim advanced is unexhausted and admit that the procedure promotes the purposes of exhaustion and warrants tolling, or they could argue that the claim is procedurally barred and allow the case to proceed in federal court. In either case, the petitioner escapes the statute of limitations.

federal court, in most cases the state rule at issue is easily applied and there is no realistic possibility of conflict on these issues. The Second Circuit has, after all, applied the procedural bars involved in this case on many occasions without difficulty.

But even in the unusual case, when the federal court must make a close call concerning a procedural rule while a state court has the same procedural issue before it, the federal court will not be placed in an awkward position. Any such true ambiguities in the application of the procedural bar will be resolved in favor of petitioner. If there is a realistic likelihood that the state court will review the issue, then the petition will be dismissed. This will encourage exhaustion, promote comity, and avoid the specter of unseemly disagreements between federal and state courts. And, in a worst-case scenario, the federal court could simply hold the petition in abeyance for the pendency of the state proceedings. Moreover, even if comity concerns might still be implicated in an extremely rare case, there would be no reason to abandon an interpretation of the statute that gives effect to state court procedural bars simply because of a rare case in which it might present a problem. This Court could address the rare case when and if the circumstances ever presented themselves.

Finally, some courts, including the Second Circuit, have made various arguments minimizing the delays that would be engendered under an interpretation of §2254(d)(2) that tolls for procedurally barred motions. For example, the Second Circuit declared below that state prisoners have "little incentive to delay determination of their habeas petitions," *Bennett*, 199 F.3d at 123, and that the state need not fear delays from repetitious litigation for this reason. *Id.*; *see also Villegas*, 184 F.3d at 472. But this observation simply does not apply to prisoners in capital cases, who in fact have a very powerful incentive to delay and who, under the Second Circuit's interpretation, are encouraged to file repetitive litigation to delay as much as possible.

Inasmuch as Congress expressed in no uncertain terms both its belief that these delays by capital prisoners were intolerable and its intention to limit such delays, it cannot be concluded that Congress would find the Second Circuit's interpretation acceptable.

Moreover, as to prisoners in non-capital cases, whether an "incentive" to delay exists or not, state prisoners often engage in repetitious litigation that in fact causes years of delay. *See* Flango & McKenna, *supra*, at 245. State prisoners may engage in such needless litigation for any number of reasons, such as, as some have suggested, because repetitious litigation has a therapeutic value for prisoners, *see* Flango & McKenna, *supra*, at 274, or because prisoners need to hold out hope that they will escape their confinement and they thus find it necessary to deny the finality of their convictions. Regardless of the reason, however, Congress perceived these delays as pernicious in non-capital as well as capital cases, and enacted a statute of limitations to address them. Thus, whatever the Second Circuit's opinion as to the incentives of state prisoners, Congress's perception of the actual problems of delay in non-capital cases must be respected.

Similarly unavailing is the suggestion that states can control these delays by creating "conditions precedent" to filing. *See Habteselassie v. Novak*, 209 F.3d at 1210; *Villegas*, 184 F.3d at 471, 472-73; *see also Bennett*, 199 F.3d at 123. These courts have suggested that such controls could take the form of bars to filing imposed on particular abusive filers, *Habteselassie*, 209 F.3d at 1210; *Villegas*, 184 F.3d at 473, or the form of statutory pre-conditions to filing under a scheme similar to the pre-filing review required for second federal habeas petitions under AEDPA's revision of §2244(b). *See Habteselassie*, 209 F.3d at 1212; *Villegas*, 184 F.3d at 471, 472-73.

But a requirement that state courts enact such provisions in order to limit the tolling provision and obtain the benefits of the statute of limitations would convert the statute into a "straightjacket," severely limiting the ways in which a state court can address the obdurate problems of repetitive prisoner litigation. Such a rule cannot be squared with principles of federalism that require that the states retain the authority, within the confines of the Constitution, to address difficult policy issues in the manner that they see fit. *See Smith v. Robbins*, __ U.S. __, 120 S. Ct. 746, 757-58 (2000); *Murray v. Giarratano*, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring). While some states may choose to attempt to control excessive prisoner litigation in the manner suggested by these courts, others have chosen different procedural schemes that may serve the interests in managing post-conviction litigation just as well, or even better. Any attempt to validate only certain types of procedural schemes would "contravene [the Court's] established practice, rooted in federalism, of allowing the States wide discretion . . . to experiment with solutions to difficult problems of policy." *See Smith v. Robbins*, 120 S. Ct. at 757. As this Court stated only recently, "it is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the states from the top down." *Id.* at 758; *see also Murray v. Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring).

Moreover, the courts that hold that the only procedural requirements that will be respected under the tolling provision are those that are in the form of a "condition precedent" to filing, *see Habteselassie*, 209 F.3d at 1210, fail to give effect to all the words in the tolling provision, and thus their analysis is fatally flawed. Congress required not only that an application be "filed," but that it be "properly filed." Under a view that requires a state to establish "pre-conditions" to filing, all a federal petitioner need show to get the benefit of the tolling provision is that the state allowed him, eventually, to file the

application. This interpretation directly contravenes the "cardinal principle of statutory construction that [the Court] must '"give effect, if possible, to every clause and word of a statute."'" *Taylor v. Williams*, __ U.S. __, __, 120 S.Ct. 1495, 1519 (2000) (quoting *United States v. Mensche*, 348 U.S. 528, 538-39 (1995)).

Thus, the courts criticizing an interpretation of "properly filed" that accords respect to mandatory state procedural rules have failed to raise any valid objection to it, particularly one that would outweigh its benefits. And whatever the alleged ills of this interpretation, they do not justify adopting a rule such as the Second Circuit's that would effectively nullify the statute of limitations, extend the tolling provision far beyond its purpose to allow for exhaustion, and undermine state efforts to control post-conviction litigation.

**D. The Interpretations of "Properly Filed" Applied in Other Circuits that Toll for Procedurally Barred Motions Suffer from the Same Defects as the Second Circuit's Rule and Do Not Provide Any Better Alternative to that Rule.**

The Third, Fifth, and Tenth Circuits have not adopted the Second Circuit's interpretation that allows tolling for any application "recognized as such" under state law. The Third and Fifth Circuits have instead adopted a rule that denies tolling for applications that fail to comply with rudimentary filing requirements and state procedures regarding the "time and place of filing."[9] The Tenth Circuit has held that any state rule that is written as a pre-condition to filing, such as a scheme similar to AEDPA's second petition filing requirement (*see* 28 U.S.C.

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[9]This interpretation has also been applied by the Fourth and Sixth Circuits in unpublished opinions. *See Young v. Mohr*, 1999 U.S. App. LEXIS 34018 (6th Cir. 1999); *McSheffrey v. Angelone*, 1999 U.S. App. LEXIS 2735 (4th Cir. 1999).

§2244(b)), or any pre-condition to filing judicially imposed on a particular abusive filer, will also be given effect under the tolling provision. These interpretations suffer from the same defects as the Second Circuit's rule and do not offer a viable alternative to an interpretation that denies tolling for procedurally barred motions.

The Third and Fifth Circuits' "time and place of filing" rule is inadequate for three reasons. First, this interpretation would still allow many needless delays that do nothing to further the purpose of the tolling provision. Under this interpretation, as long as an application is timely under state law, prisoners can file claims already raised on direct appeal or claims raised in a prior motion and still obtain the benefit of tolling. Such repetitious procedurally barred applications do not advance the purposes of exhaustion and indeed serve no purpose other than delay. There is simply no reason to tolerate such delays.

Second, the "time and place of filing" rule, as interpreted, would not prevent capital prisoners in most states from causing extensive delays to avoid execution for as long as possible. The rule has recently been held to preclude tolling only when the state imposes an absolute time bar, and not when the time bar contains any type of exception. *See Smith v. Ward*, 209 F.3d at 385 (tolling for time-barred state application because state statute contained exceptions for claims based on new facts and new rules of law). Most states that have adopted a statute of limitations for post-conviction applications, however, have not been so harsh as to do so without exception. For example, state post-conviction statutes of limitations ordinarily permit the filing of claims based on facts that could not have been discovered previously and for novel claims based on retroactively effective changes in the law. *See, e.g.*, Del. Super. Ct. Crim. R. 61(i)(1); Fla. R. Crim. Proc. 3.850(b); Iowa Code §822.3; La. Code Crim. Proc. art. 930.8(A)(1),(2). If state prisoners can file late applications in state court under such

statutes and still obtain tolling, they can extend the limitations period indefinitely simply by filing such late, time-barred motions. Here again, the Third and Fifth Circuits' rule fails to avoid the serious flaws in the Second Circuit's interpretation.

Third, the Third and Fifth Circuits' rule offends notions of federalism. It shows respect for only a small fraction of the states' procedural rules and requires that a state use a statute of limitations, indeed an absolute time-bar, to control post-conviction litigation in order to avoid extensive delays under the tolling provision. But all of the states' procedural efforts to control prisoner litigation are due respect under principles of federalism, and a requirement that states enact time-bars to avoid tolling delays creates a statutory straightjacket that again "imposes a single solution from the top down." *Robbins*, 120 S.Ct. at 758.

Moreover, it may be unwise even from a state prisoner's point of view to require states that have no time limitation on post-conviction motions, like New York, to adopt time limitations, or to encourage states with statutory exceptions to time-bars to abandon those exceptions. These states have shown concern for prisoners who may obtain information suggesting that they were wrongfully convicted after what would otherwise be a reasonable time, and the states may prefer to rely on rules that limit successive petitions or that preclude the use of collateral litigation as an appeal to channel resources to more worthy claims. Respecting only state time bars, or only absolute time bars, may encourage states to enact legislation far more harsh than they would otherwise be inclined to consider.

The Third and Fifth Circuits' view, then, fails to avoid the serious deficiencies of the Second Circuit's rule and raises additional concerns for prisoners who may find themselves facing new and very harsh state time bars.

The Tenth Circuit's view suffers from many of these same defects. That court requires petitioners to comply with any pre-conditions to filing that a state court may choose to impose on particular abusive filers and to comply with other statutory "conditions precedent," such as ones similar to AEDPA's second petition pre-filing review. *See* §2244(b). This interpretation, like the Fifth, Third, and Second Circuits' rules, fails to give effect to state procedural rules unless they are not imposed as "pre-conditions" to filing. It allows dilatory, repetitive motions that go well beyond the purposes of exhaustion. And, once again, this view contravenes principles of federalism by crediting only particular solutions, which the states, in their experience, may be reluctant to impose for quite legitimate reasons. State legislators with genuine objections to enacting "condition precedent" rules should not be required "to follow any particular federal model" in post-conviction proceedings in order to avoid extensive delays under the tolling provision. *See Giarratano*, 492 U.S. at 13 (O'Connor, J., concurring).

Thus, because the interpretations of the Third, Fifth, and Tenth Circuits bear the same dangerous deficiencies as the Second Circuit's rule, they provide no viable alternative to the Second Circuit's formulation.

**E. Because Bennett's Second State Post-Judgment Application Was Procedurally Barred Under State Law, It Was Not "Properly Filed" and Did Not Toll the Statute of Limitations.**

When Bennett filed his second application for post-conviction review under section 440.10 of the New York Criminal Procedure Law, he included one claim that had already been rejected by the Appellate Division and two claims predicated on the record of his trial that had taken place eleven years earlier. These claims were mandatorily procedurally

barred under state law, which precludes a defendant from raising issues on collateral attack that were or could have been raised on direct appeal. Thus, Bennett's motion was not "properly filed," under the correct interpretation of that phrase, and did not toll the statute of limitations.

Under New York law, a collateral attack on the judgment of conviction under section 440.10 is subject to three mandatory procedural bars, which are designed to prevent this section from being used as a substitute for direct appeal. *See* New York Crim. Proc. Law §440.10(2); *People v. Cooks*, 67 N.Y.2d 100, 103, 500 N.Y.S.2d 503, 505 (1986). Two of those are relevant to Bennett's second post-conviction motion. Under section 440.10(2)(a), a defendant is precluded from raising an issue that was "previously determined on the merits upon an appeal from the judgment" absent a retroactively effective change in the law. Under section 440.10(2)(c), a defendant is barred from raising a claim when "sufficient facts appear on the record of the proceedings underlying the judgment to have permitted" review of the claim on appeal but review does not take place due to the defendant's "unjustifiable failure" to raise the claim.

These procedural bars serve vital interests of the state. They ensure that the state has an opportunity to resolve the issues raised "shortly after trial, while evidence is still available both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal." *Murray v. Carrier*, 477 U.S. 478, 490-91 (1986) (quoting *Reed v. Ross*, 468 U.S. 1, 10-11 (1984)). They also "promote[] not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together as quickly after trial as the docket will allow . . . ." *Id.* Failure to raise a claim on appeal "reduces the finality of appellate proceedings, deprives the appellate court of an opportunity to review trial error, and 'undercut[s] the State's

ability to enforce its procedural rules.'" *Id.* (quoting *Engle v. Isaac*, 456 U.S. at 129).

All of Bennett's claims in his second post-judgment motion to vacate his conviction were barred under these provisions. Bennett first argued that the trial court's preclusion of his defense witness for lack of a statutory notice was reversible error. This claim had been raised on direct appeal, and, although the Appellate Division agreed that error occurred, the court found the error harmless beyond a reasonable doubt. *People v. Bennett*, 128 A.D.2d at 540, 512 N.Y.S.2d at 473. Thus, the issue had previously been decided against Bennett on direct appeal. Moreover, Bennett never established that there had been any retroactively effective change in the law.[10] As a result, this claim was mandatorily barred under state law.

Second, Bennett made a half-hearted argument, in the midst of his complaints about the trial court's preclusion of his witness, that "[t]he prosecutor should have been charged . . . for misconduct" because he "never mention[ed] the lack of notice prior to trial . . . leading the court to believe nothing was wrong" (JA 119). This claim was based on the trial record and could have been made on appeal. Bennett, however, did not include this claim among his six appellate issues. Moreover, Bennett never sought to invoke the "unjustifiable failure" language of the statute to excuse his failure to raise the issue. As a result, this issue too was mandatorily barred under section 440.10(2)(c).

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[10]Although Bennett made a passing reference to "recent changes in the law as it relates to harmless error" (JA 114), he never identified what changes he was referring to nor did he cite any cases in support of his conclusory assertion. He also never established or even alleged that the supposed changes were retroactively effective on collateral review. Thus, Bennett never established any retroactively effective change in the law, and indeed failed to make even a colorable argument that there had been one.

Third, Bennett made a claim that he was deprived of his right to be present at the pre-trial *Sandoval* proceeding to determine which prior crimes could be used against him. This too was an on-the-record claim that could have been raised on direct appeal. Indeed, Bennett specifically asserted that "it is clear from the record and the court reporters [sic] transcription of the record that the petitioner was not present . . . ." (JA 120). Bennett then relied on the trial transcript in presenting his argument: he cited to the portion of the transcript of the proceedings immediately prior to the hearing, he observed that the transcript stated "Appearances same as previously noted," and he argued that he was not noted to have been present on the previous day (JA 119-20). Bennett could have used this same portion of the record to make this identical argument on appeal, but he failed to do so. For this reason, and because Bennett never invoked the "unjustifiable failure" portion of the statute in an attempt to excuse his failure, his claim was procedurally barred.[11]

Thus, because all of the issues raised in Bennett's application were mandatorily procedurally barred under state

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[11]Nor did the fact that the state argued that Bennett was present at the *Sandoval* proceeding make his argument one that was outside the record. The state too cited to a portion of the record, namely a notation in the trial court's papers, to support its view that Bennett had been present (JA 129). Under state law, such disputes over conflicts in the record in general, and disputes over record-based conflicts regarding a defendant's presence at trial in particular, are resolved prior to or during the appeal by a motion to resettle the record, *see People v. Browne*, 195 A.D.2d 946, 601 N.Y.S.2d 746 (2d Dept. 1993), or by holding the appeal in abeyance and remanding for a hearing in front of the trial court, *see, e.g., People v. Michalek*, 82 N.Y.2d 906, 609 N.Y.S.2d 172 (1994); *People v. Odiat*, 82 N.Y.2d 872, 874, 609 N.Y.S.2d 166, 167 (1993). These procedures ensure that the dispute is settled in a timely manner while memories are still fresh. And, under either procedure, the defendant is required to bring the challenge prior to or during the appeal, which Bennett failed to do.

law[12] and the state trial court in which the motion was filed could not hear the merits of the claims, Bennett's motion was not "properly filed." He was thus not entitled to the benefits of the tolling provision.

Nor does the fact that the state trial court uttered a one-word denial and thus did not explicitly invoke the procedural bar make Bennett's application "properly filed" so as to afford him the benefits of tolling. This is so both because the "plain statement" rule should not be incorporated into the tolling provision, and because even if it was, it would not apply under the facts of this case.

The plain statement rule was developed as an aid to applying the adequate and independent state ground doctrine. As applied to cases on direct review, that doctrine precludes this Court's consideration of a federal claim when there exists an independent and adequate state ground upon which the judgment is based because, in such cases, this Court's decision on the federal issue can have no effect on the state court judgment and would therefore be advisory. *See Coleman v. Thompson*, 501 U.S. at 729; *Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983). The preclusion of review of the federal claim

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[12]It is possible that Bennett was also attempting to raise a claim of ineffective assistance of trial counsel in this motion. In the middle of his discussion of the trial court's error in precluding the defense witness, Bennett wrote, "Thus, if counsel was negligent in his duties to the petitioner, the issue would more properly have been to hold counsel in violation under *People v. Barrett*, 145 A.D.2d 842 [3d Dept. 1988][finding ineffective assistance of counsel]. . . ." (JA 117). This claim too, however, was procedurally barred in state court. It was based solely on counsel's failure to argue the witness preclusion claim properly and thus was on the record and could have been raised on direct appeal. *See Reyes v. Keane*, 118 F.3d 136, 139 (2d Cir. 1997); *People v. Baxter*, 262 A.D.2d 1068, 1068, 692 N.Y.S.2d 636, 637 (4th Dept. 1999); *People v. Orr*, 240 A.D.2d 213, 214, 659 N.Y.S.2d 1 (1st Dept. 1997).

comes solely from the adequacy and independence of the judgment below, and the question to be decided is the Court's ability to review the judgment itself. Thus, the nature of the judgment below is critical, as is an examination of any decision upon which the judgment is based. The plain statement rule helps in this examination by ensuring that a "mere possibility" that an adequate and independent state ground exists does not deprive this Court of jurisdiction. *See Long*, 463 U.S. at 1044. In the habeas context, while the doctrine does not technically affect the jurisdiction of the court, the preclusion of federal review still depends directly upon the adequacy and independence of the state court judgment, and the plain statement rule ensures that the state judgment that carries a preclusive effect contains the predicate for it. *Coleman*, 501 U.S. at 729-30; *Harris v. Reed*, 489 U.S. at 261-62.

Under the statute of limitations, however, the preclusion of federal review does not arise solely from the existence of an independent state ground supporting the state court judgment. It arises from the delay occasioned by the petitioner. It results from periods of delay independent of those resulting from any state court application, and from the delay occasioned by the petitioner's attempt to engage in repetitive litigation in state court by invoking a remedy that is unavailable and that therefore cannot advance the tolling provision's purpose to allow exhaustion. Indeed, it is the rule of exhaustion rather than the independent and adequate state ground doctrine that underlies the tolling provision. In applying the tolling provision then, it is unnecessary to conclude that the state court judgment is independent and adequate of the federal claim, and a rule that is designed to assist that inquiry and to ensure that these predicates are present need not be applied.

True, an interpretation of state law may be required in applying the statute of limitations, and the state court decision is of course important in making that determination. Thus, if the

state court examined the merits of the petitioner's claim other than as an alternative ground for denial, petitioner would be able to argue that relief was in fact available to him at the time he made the motion and would obtain the benefit of the tolling provision. But when the court is simply silent in the face of an otherwise clearly applicable mandatory procedural bar that the federal court would readily apply under the exhaustion doctrine, there is no reason to apply the plain statement rule's conclusive presumption that the state court decision was based on federal law rather than the state procedural bar. Indeed, the plain statement rule's presumption is unwarranted in such circumstances because it almost certainly would be incorrect. *See Coleman*, 501 U.S. at 737 ("the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time"). Moreover, applying the rule under such circumstances would "place burdens on the States and state courts in exchange for very little benefit to the federal courts." *Id.* at 738. It would burden the states by denying them the benefit of the statute of limitations in many cases, and it would burden the state courts by requiring them to write opinions on every state prisoner's application for post-conviction relief no matter how many he files. Thus, the plain statement rule should not be incorporated into the tolling provision.

Furthermore, even if the plain statement rule were imported into the context of the tolling provision, Bennett could not obtain the benefit of it. The rule does not apply unless the state court decision "'fairly appears to rest primarily on federal law, or to be interwoven with the federal law.'" *Id.* at 735. In making these types of determinations, this Court has looked to the terms of the procedural rules to determine whether they are mandatory or permissive, the state court decisions applying the bar, and the basis for opposition to the claim. *Id.* at 740-44. Here, the language of the two procedural bars at issue is mandatory: the state statutory bar requires that "the court *must*

deny a motion to vacate a judgment when" the conditions are met. N.Y. Crim. Proc. Law §440.10(2) (emphasis added). This is in direct contrast to the procedural rules that immediately follow, which specifically state that "the court *may* deny a motion to vacate a judgment" under other specified conditions. N.Y. Crim. Proc. Law §440.10(3) (emphasis added). Moreover, state cases routinely treat the bars at issue as mandatory and as precluding merits review. *See Arce v. Smith*, 889 F.2d 1271, 1273 (2d Cir. 1989), *cert. denied sub nom. Arce v. Berbary*, 495 U.S. 937 (1990). Furthermore, the state opposed the first two claims, the only federal claims in the petition,[13] entirely on procedural grounds (JA 127-28). For these reasons, and because the state courts had already written three decisions addressing the validity of Bennett's conviction, it was not surprising that the state court issued only a one word denial of Bennett's claims. It does not fairly appear that this one word denial of relief as to Bennett's clearly barred claims involved a review of federal law or was interwoven with federal law. As a result, the plain statement rule does not apply here.

In short, Bennett attempted to raise his claims both in the wrong court and at the wrong time. State law required that Bennett's claims be advanced in the Appellate Division at the time of his direct appeal. But Bennett ignored the state's procedural rules: he brought a motion in the trial court eleven years after his appeal had been concluded. This motion did nothing to exhaust his state remedies; it was procedurally barred and the state trial court could not adjudicate the merits of the claim. Indeed, Bennett's motion was nothing more than an exercise in unnecessary repetitive litigation. There is simply no

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[13]As to his third claim, Bennett made clear in his motion papers that he was asking for relief under *People v. Dokes*, 79 N.Y.2d 656, 584 N.Y.S.2d 761 (1992), and *People v. Favor*, 82 N.Y.2d 254, 604 N.Y.S.2d 414 (1993). Those decisions are based exclusively on state law. *Favor*, 82 N.Y.2d at 262, 604 N.Y.S.2d at 498-99.

reason to be found either in the purposes of the statute of limitations or those of the tolling provision to accord the benefits of tolling for such a motion.

Because Bennett's second post-conviction motion was mandatorily procedurally barred under state law, it was not "properly filed" within the meaning of the tolling provision. The Second Circuit thus incorrectly tolled the statute of limitations during the pendency of this motion. For this reason, the judgment of the Second Circuit should be reversed.

## CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

RICHARD A. BROWN
*District Attorney*
Queens County

GARY S. FIDEL
JOHN M. CASTELLANO
*Assistant District Attorneys*
*Of Counsel*

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